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Overview:

Overall, we feel the *Phase I* Maryland Implementation Plan(WIP) was a solid first draft of recommendations and strategies, but look forward to significantly more detail and specifics about how target goals will be met in the Phase II process. Given that a strong and enforceable WIP's are absolutely essential to the implementation of the Bay wide TMDL, we are hopeful that this increased level of detail will provide an accurate and geographically specific roadmap that will help our local waterways in the Baltimore Metropolitan become cleaner and healthier on their way to meet the Chesapeake Bay. As an organization primarily focused on urban/suburban issues the bulk of these comments will seek to highlight and emphasize items primarily related to storm water runoff. It should be noted that we support and reference the full suite of comments submitted by the Center for Progressive Reform (CPR) and the Choose Clean Water Coalition and those of the Waterkeepers (WK) of which the Baltimore Harbor Waterkeeper is a program of the Baltimore Water Alliance.

Priority Comments:

As CPR explains, the WIP mainly inventories the state's existing pollutant control programs as "options" unaccompanied by programmatic or funding commitments or deadlines for implementation. The phase II WIP should detail the entity responsible and timeline, for specific practices and how much it is going to cost, and if possible note the funding source. Without specific, enforceable, time-sensitive implementation detail in the difficult areas, it is likely there will be less action and accountability. In this regard, we would like to highlight a comment in CPR's Maryland contingencies section: it reads: "In the final WIP, Maryland should ensure that its contingencies are clearly identified and are coordinated with specific failures, have timely implementation deadlines, are effective, and have legal authority to require implementation." This concept should be reflected in virtually every paragraph of the WIP.

As noted by others, the draft WIP was written with a different goal in mind: it states that it was "expressly written to solicit public comments on a wide range of pollution control strategy options.... [T]he options chosen to implement the needed reductions will be selected with the benefit of the public comments...." Examination reveals that some of the options include an associated nutrient reduction amount, while others do not. Similar "options" have been proposed for the Bay clean-up in Tributary plans, and most everything in Maryland's WIP has been seen over and over again. In these

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regards, the WIP is not much of an improvement over the earlier Tributary Strategies which have failed to bring about meaningful water quality improvements.

We agree with CPR that opportunities for public comment are “valuable, but ultimately Maryland must make the tough decisions that protect the environment and lead to a restored Bay for present and future generations.” Although the laundry list of options has some good things in it, it should not be up to the public to cherry pick the winning combination of activities from a long list. Maryland has erred “by leaving the particulars open to debate,” and as a consequence “is likely to receive less focused and less helpful comments.” Maryland has some of the best scientists, engineers, and watershed specialists in both the private and public sectors and we believe a more detailed suite of restoration/retro-fit options using the best available technologies and thinking can be created with the necessary detail on costs, timelines etc.

Additionally, as CPR points out, the “WIP does not explicitly commit to any of those options.” Unfortunately, the options are not accompanied by “funding commitments or deadlines for implementation” which is exactly why past efforts have not yielded sufficient results. What is more, these “options” are proposed in a context in which Maryland has not committed sufficient resources to meet its own current regulatory requirements and does not specifically state that a “gap analysis” of key administrative or institutional milestones be completed by state and local jurisdictions to address known gaps in personnel for inspection and monitoring. Without sufficient resources and personnel, and a new ‘mind set’ around enforcement of regulatory requirements, no “options” will be sufficient.

We also want to highlight comments by the Waterkeeper “Inexplicably, the Maryland WIP omits vital information it has previously disclosed as part of its laudable annual enforcement and compliance report. For example, Maryland’s draft WIP does not include the permitting and enforcement information already contained in its annual report to establish its baseline capacity. The final Phase I WIP should mine information from Maryland’s annual report to resolve this problem.’

We are pleased that the “draft WIP meets the nitrogen and phosphorus allocations and reduces the sediment pollution to a level that is 26 percent below the target allocation.”¹ On the other hand, Baltimore Water Alliance has a particular concern about the way Maryland’s Draft WIP deals with the issue of sediments. Section 5.1 states:

"The Chesapeake Bay TMDL requires both nutrient and sediment reductions. To begin developing options to reduce sediment loads the sediment reduction values from existing milestone practices were calculated. Maryland received draft sediment targets on August 13, 2010. Maryland is operating with the expectation, supported by EPA, that because of the close relationship between sediment and phosphorus loads, initial nonpoint sources strategies to achieve phosphorus goals will give a reasonable indication of whether the sediment goals are likely to be achieved. Consequently, limited attention is given to sediments in this draft of the Plan."

The assumption that sediments will be automatically addressed by dealing with non-point phosphorus loads is extremely environmentally significant. Yet the WIP does not describe a scientific basis for this assumption. The EPA should not accept this high impact assumption without an unimpeachable scientific justification.

¹ U.S. E.P.A., “Summary: EPA Evaluation of Maryland Draft Watershed Implementation Plan” (Sept. 22, 2010).

NPDES Permitting/Enforcement of NPDES Permits

CPR points out that in the draft WIP “Maryland included some information about its permitting program . . . , but failed to disclose information about existing facilities without permits, if any, or existing facilities with expired or administratively continued permits. . . . Maryland also failed to establish deadlines, timelines, or qualitative goals for updating and reissuing expired and administratively continued NPDES permits.”

The Baltimore Water Alliance is concerned that there has been prolonged and chronic failure to enforce lack of compliance with permitting goals, and needs assurances in the WIP that new, more stringent permits will be monitored and compliance issues enforced. As the Waterkeeper comments state: “Maryland has failed to issue permits; failed to reissue permits in a timely manner; failed to issue permits that conform with federal requirements including the requirement to have meaningful links to existing TMDLs; failed to inspect facilities as required by law; failed to fulfill its monitoring responsibilities; failed to effectively enforce the program; failed to seek adequate penalties; and failed to comply with public participation requirements.”²

Thus, we endorse CPR’s analysis and recommendation that “Maryland’s final WIP should explain how it intends to improve its enforcement program and address these issues as they relate to the Bay.”

Monitoring and Verifying Voluntary Practices by Nonpoint Sources

We agree with CPR that “the final WIP should include information regarding participation and effectiveness of [best management practices funded by the MACS program.]” In addition we also concur that the final Phase I WIP must provide for dedicated funding for monitoring and verification.

Contingencies

CPR points out that overall “the draft WIP fails to discuss what contingencies Maryland will implement for slow or incomplete implementation.” We agree with CPR that the final Maryland WIP should have timely implementation deadlines, and contain specific plans to implement clearly identified contingencies in the event of delayed adoption of new or revised legislation or regulations, inadequate compliance or participation rates, or adverse changes in land use or development rates.³ We believe it is essential that the WIP include detailed and strict contingencies for any source that fails to meet the TMDL limits and two-year milestones.

Stormwater

CPR correctly observed that the draft WIP “does not disclose the estimated funding and personnel gap, if any, and does not explain how this gap will be filled to ensure that the state has and maintains an effective stormwater program.” This is especially true in Phase 1 MS4 jurisdictions. Maryland says its WIP supports the “reasonable assurance of implementation for Maryland’s part of the TMDL.”⁴ “This includes a demonstration that achieving load reductions required by the TMDL can reasonable be met, that is, current or anticipated resources and commitments are expected to be sufficient.”⁵ However, the MD WIP says that locally administered programs will be analyzed in Phase II.⁶ If the

² 40 C.F.R. § 123.63.

³ Expectations Letter, *supra* note **Error! Bookmark not defined.**

⁴ MD WIP Exec. Summary, ES-1.

⁵ *Id.*

Phase I WIP fails to analyze these Phase I MS4 jurisdictions and their capacity to achieve reductions, how can they provide any assurance that Maryland's implementation will be successful?

Baltimore city is one of the largest and oldest MS4 jurisdictions in the state of Maryland. The city was primarily built out before any stormwater management was in place, and has consistently failed to meet its current permit obligations. Without significant additional funding, it is virtually impossible they will be able to meet these enhanced mandates:

- 20% reduction in Nitrogen
- 34% reduction in Phosphorus
- 37% reduction in Total Suspended Solids⁷

Baltimore City is attempting to legislate a local stormwater utility. However, a state-wide stormwater utility -- with rates determined and collected by the local jurisdictions -- would ensure that there would be a protected, reliable source of funds for costly retro-fitting, new green infrastructure, and neighborhood scaled best management practices. Moreover, a statewide mandate would ensure that all jurisdictions begin to tackle the specific run-off issue that is contributing the highest loads within their boundaries, and would ensure this burden is being felt by all citizens, not just in places where the political will is there to create local fees. We endorse Waterkeeper's assertion that MD should commit to passing this legislation in the phase I WIP.

Conclusion:

There can be no doubt that the creation of the Phase I and II WIP's is a complex and complicated process. We hope that MDE and its partner at EPA will continue to push forward with a comprehensive set of new rules and ensure sufficient oversight and funding is available. Additionally, we hope that there will be continued openness and collaboration with local governments and the many non-profit organizations, business groups and academic institutions dedicated to improving water quality in our streams, rivers and the Chesapeake Bay itself.

Respectfully submitted

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Center for Progressive Reform and Waterkeeper Alliance comments submitted directly and Baltimore Water Alliance had expressed consent for reference.

cc. The Honorable Lisa Jackson /Administrator /U.S. Environmental Protection agency

⁶ *Id.* at p. 8.

⁷ MD WIP Executive Summary pp 6-7.